Tuesday, March 3.

SECOND DIVISION.

[Lord Gifford, Ordinary.

CRICHTON *v.* CRICHTON'S TRUSTEES.

Succession—Testament—Reduction—Fraud—Essential Error.

A testatrix died leaving by trust-disposition and settlement a nominal sum to her heirs-at-law and the rest of her means to certain persons therein named. Subsequently her heirs-at-law executed a deed of ratification of the will, and a conveyance of the estate to the beneficiaries under the will, in consideration of a sum equal to about one-seventh of the succession. The heirs sought reduction of the will, on the ground of the testatrix being at the time insane, and further, reduction of the two later deeds, on the ground of their having been obtained by fraud and of essential error. *Held* that a proof before answer must be allowed.

This action was one of reduction at the instance of Richard and Andrew Crichton against the Rev. James Milroy, Patrick Soutar, writer, Dunfermline, and William Beveridge, writer there, the trustees under the trust-disposition and settlement of Miss Jessie Crichton, together with Mrs Soutar, Miss Milroy, Mrs Salmond, and Edith Mary Soutar, beneficiaries under the deed.

The pursuers claimed to be the half-brothers, and as such, heirs-at-law and *in mobilibus* of the deceased Miss Jessie Crichton. It was asserted by them that their sister, on the 29th August 1872, the date of the deed, was imbecile, weak, facile, of unsound mind, easily imposed upon, and incapable of managing her own affairs, or of giving directions therefor, and that she continued in that state until she died. During this period she was subject to insane delusions of various kinds; in particular, that those who attended on her meant to poison her. In addition, she was inclined to commit, and on various occasions had attempted to commit, suicide. Her state of mind was such that she had to be watched day and night. In October 1872 Miss Crichton was removed to the Springfield Asylum, near Cupar, and she died there on 2d November 1872.

The pursuers (Cond. 5) averred that taking advantage of Miss Jessie Crichton's state of mind, and of the influence and control which he had acquired over her, the defender, Patrick James Soutar, instructed the defender William Beveridge, or his firm of Beveridge & Darling, writers, Dunfermline, to prepare the trust-disposition and settlement after mentioned, and they, on or about the 29th August 1872, well knowing that Miss Crichton was then of weak and unsound mind, fraudulently procured her signature to a pretended trust-disposition and settlement, the purposes of which were, *inter alia*, (1) for payment of Miss Jessie Crichton's just and lawful debts; (2) for delivery to Miss Milroy, eldest sister of the defender the Rev. James William Milroy, of her gold watch and appendages; (3) for payment of the following legacies:—"to each of my half-brothers the sum of £5, to my friend Mrs Fanny Gofton or Salmond, widow of Robert Salmond, sometime of the Royal Navy, residing at the Royal Naval Asylum, Penge, the sum of £1000 sterling;" and (4) the trustees were directed as follows:—"to realise and convert the whole of my said estate, both heritable and moveable, into cash, and that so soon as conveniently may be, and to pay over the residue and remainder of my said means and estate to Edith Mary Soutar, eldest daughter of the said Patrick James Soutar, whom failing, to the said Edith Mary Soutar's brothers and sisters equally; and I hereby declare that the receipt or discharge for said residue by the administrator-in-law of the said Edith Mary Soutar, or of her said brothers and sisters, if they are not of age at the time of my death, shall be a sufficient discharge to my said trustees." The value of the estate as given up by inventory was £4361, 15s. 10d. The pursuers, who are both persons in the lower ranks of life, and of very defective education, had not been in the habit of associating much with their sister, although they were on friendly terms with her, and they were not at the time of her death, nor for a considerable time thereafter, aware that her estates were of anything like the value which they have turned out to be. They were also ignorant of their legal rights in the premises, as well as of Miss Jessie Crichton's insanity at the date of the execution of the will, and of the circumstances under which it was procured from her.

The pursuers (Cond. 9) also further stated that in order fraudulently to deprive them of their succession, the defenders procured from them, on 10th May 1873, two deeds, viz., (1) a ratification of the trust-disposition and settlement; and (2) a disposition, on the consideration of £600, of the whole estates of Miss Jessie Crichton in favour of the defender Mrs Barbara Gray Macdonald or Soutar. These deeds, it was alleged, were granted in reliance on the statements of the defenders, to the effect that Miss Crichton was of sound mind at the date of the will, and while the pursuers were in ignorance of the real value of her estate. They were falsely and fraudulently led to believe the arrangement one most beneficial to their interests, seeing that under the will there was only £5 left to each of them, while thus they got £600.

The pursuers (Cond. 11) were misled, they averred, by a letter written to them by Messrs Beveridge & Darling on 23d November 1873, in answer to inquiries made by their agent Mr Smillie as to whether Miss Crichton was, at the time when the trust-disposition was executed by her, "not able to take care of herself by reason of mental derangement."

The letter in reply was as follows:—"In reply to your favour of the 21st inst., we have to say that the testatrix was unknown to us personally until our Mr Beveridge was sent for to make her settlement. She was then quite capable of giving instructions for the settlement of her affairs, and even made remarks on the deed when it was read over to her before execution, which was the day after her instructions were given."

The deeds accordingly which the pursuers sought to reduce were the ratification and disposition granted on May 10, 1873, and the trust-disposition and settlement by their sister Miss Crichton.

The pursuers' pleas were—(1) Nullity of the will by reason of fraud and circumvention; (2) nullity of the same by reason of the testatrix being at the time insane; (3) fraud and circumvention in procuring the deed of ratification and the disposition, thereby rendering the same reducible; (4) essential error as to these last two deeds, induced by fraudu-

lent representation; (5) a general plea of reduction of all the deeds.

The defenders pleaded—(1) No title, as having executed the ratification and disposition; (2) irrelevancy of statement; (4) the ratification and relative disposition having been granted by the pursuers in consideration of the sum paid to them in terms of the agreement concluded between the parties, the defenders are entitled to absolvitor, with expenses.

The Lord Ordinary (GIFFORD) pronounced the following interlocutor:—

"*Edinburgh, 2d December* 1873.—The Lord Ordinary having heard parties' procurators upon the issues proposed by the pursuers, lodged on 19th November last, and on the amended issues proposed by the pursuers, lodged 25th November last, and having also heard parties' procurators on the defenders' plea of relevancy, disallows the whole issues proposed by the pursuers: Finds that the pursuers have set forth no relevant and sufficient grounds for setting aside the deeds of ratification, dated 10th May 1873, No. 8 of process, and the disposition of same date, No. 9 of process, both granted by the present pursuers: Finds that these deeds form an effectual bar to the reduction of the trust-disposition and settlement by the late Miss Jessie Crichton; therefore dismisses the action, and decerns: Finds the defenders entitled to expenses, and remits the account thereof to the Auditor of Court to tax the same and report.

"*Note.*—Although the questions in the present case arose, in the first instance, at the adjustment of the issues, they ultimately resolved into questions as to the relevancy and sufficiency of the pursuers' averments, as founding their claim to reduce and set aside the whole deeds of which they complain: and the Lord Ordinary has considered the case in both aspects.

"There is no doubt of the relevancy and sufficiency of the pursuers' averments, so far as they relate to the conclusions for reduction of the late Miss Jessie Crichton's trust-deed, and accordingly the Lord Ordinary had no difficulty in adjusting the first and second of the amended issues proposed by the pursuers. They are simply the ordinary issues of—(1) Not the deed; and (2) Facility and circumvention.

"But the peculiarity of the present case consists in this, that after the pursuers had intimated their challenge of Miss Crichton's trust-deed, they entered into a transaction or compromise, under which they received the sum of £600 sterling, which they still retain, and in consideration thereof granted, on 10th May 1873, first a formal ratification of Miss Crichton's settlement, and second, a formal disposition of Miss Crichton's whole estate. The pursuers now seek to set aside this compromise (without, however, offering to repay the £600), and the question is, whether they have set forth relevant and sufficient grounds for doing so.

"Before disposing of the question of relevancy, the Lord Ordinary gave the pursuers an opportunity of amending their record if they chose to do so. He did so after the discussion on the issues, and when the true question of relevancy had been made clear; and he did so in order that the decision of the case might not turn on any accidental omission, or on any technicality, but on the real question between the parties. The pursuers' counsel, however, stated that he had no amendment whatever to propose. He very properly explained that the case on record was the only case which the pursuers were prepared to prove, and of course they would make no averment which they were not prepared to instruct.

"This being so, the Lord Ordinary has come to the conclusion that the pursuers' averments, supposing them proved, are not sufficient to warrant the reduction of the compromise of May 1873, and of the ratification and disposition in which that compromise was embodied.

"(1) It is always very difficult to set aside a compromise or transaction deliberately entered into by parties between whom a dispute has actually arisen, and who hold in reference to that dispute antagonistic positions, or, as it is sometimes expressed, who are treating at arm's length with each other. In general, a strong case of fraud is required to cut down such a compromise.

"(2) In particular, it will not do merely to say, as the pursuers now do, that they were in the right in the original dispute, and would have been successful therein. It is vain for the pursuers to say that, *de facto*, Miss Crichton was insane, and that therefore the ratification of her deed was a mistake or error on their part. The compromise itself bears that doubts had arisen about the validity of Miss Crichton's deed, and that it was in consequence of these doubts that the pursuers received £600. Parties took opposite views, and it is the very meaning of a compromise that without determining which is right a settlement shall be come to.

"(3) It is necessary very minutely to examine the statements of the pursuers. Now, in reference to the ratification and disposition, they do not really aver fraud at all. Their whole case is laid upon Messrs Beveridge & Darling's letter of 23d November 1872; and although they say that this letter contained false statements, they do not say that the statements were false, even to the knowledge of the writers Messrs Beveridge & Darling, much less do they say that they were falsely and fraudulently made, with the knowledge and by the instructions of the present defenders.

"The truth is, that at best that letter of 23d November 1872 is a mere precognition of Mr Beveridge, and however false or misleading his precognition might have been, this would afford no ground for setting aside a formal compromise deliberately entered into between other parties altogether.

"But it is not said, or even suggested in argument, that Mr Beveridge was not stating what he honestly believed to be true, and what he said is not offered to be brought home to the other defenders.

"Without further criticism of the pursuers' statements, the Lord Ordinary thinks that when analysed they simply come to this, that at the date of the compromise the pursuers thought they were getting a fair settlement, but they now think that they have discovered that it was a very unfavourable one, and that they trusted somewhat to the statements of the agents for their opponents.

"Questions of title were suggested, and questions as to whether the issues should be tried separately or not, but all these points are superseded by the view which the Lord Ordinary has ultimately taken of the case."

The pursuers reclaimed, and argued—The question here is, whether the ground stated is a relevant one for the reduction of the deed. Had the deeds of ratification not been granted, it is not disputed

that there would have been a relevant case for reduction of the will. We say that this ratification, and the disposition following on, it were obtained by fraud. The Lord Ordinary has adopted the view that after the death of Miss Crichton the question as to the validity of the will was raised, and that the pursuers in this action chose to surrender for £600 their rights as heirs-at-law. We submit that there is disclosed a case of gross fraud. The question may be asked, to what is the enquiry to extend, and what is to be done with the £600? There is no reason why the pursuers should have to pay that into Court as a condition of going on. The defenders do not ask it, and there would be considerable difficulty in paying it. As it is, if we are successful we get the estate, and if we fail we get credit for the £600. [LORD JUSTICE-CLERK—If you fail have the other party any consideration?] We maintain that these are not honest deeds.

Argued for respondents—This was really a transaction although it was put in rather a peculiar way. [LORD JUSTICE-CLERK—Why was it put in this way?] Because Mrs Salmond was not a party to the transaction, and accordingly it was thought that she must not get the benefit of a compromise for nothing. The Soutars had truly purchased this compromise, and it was not reasonable that Mrs Salmond should reap the benefit in this way.

At advising—

LORD JUSTICE-CLERK—This case, my Lords, stands in a very peculiar position. I am not satisfied entirely with the interlocutor of the Lord Ordinary, excluding as it does all enquiry; and that being so, I will not enter into the points of importance which arise in the action itself. These we can only consider when the facts have been ascertained, and these will be so by the course about to be adopted of allowing a proof before answer. I do not regard the case as one suited for trial in the Jury Court, and accordingly the Court will retain it in their own hands. If the two deeds stand the action is excluded, whether we take the deeds as operating a transaction or as assigning the rights for a valid consideration.

In these circumstances, before further answer, I am inclined to allow to the parties a proof of their respective averments.

LORD BENHOLME—The parties here have each pushed their pleas too far, the one that theirs can competently have effect at once given to them, and the other that the question cannot be reached at all. Accordingly I am for allowing a proof before further answer.

LORD NEAVES—I cannot doubt our duty to enquire into the points raised on this record, and the enquiry should, I think, be one conducted before ourselves and not in a jury trial.

The Court pronounced the following interlocutor:—

"The Lords having considered the specification of additional documents called for by the pursuers, No. 17 of process,—Grant diligence for recovering the same, and commission to Professor Berry of Glasgow and the Sheriff-Substitute at Dunfermline to take the deposition of havers and receive exhibits, to be reported *quam primum*."

Counsel for Pursuer (Reclaimer)—Clark, Q.C., and Scott. Agent—W. R. Garson, S.S.C.

Counsel for Defenders (Respondents)—Balfour and Keir. Agents—M'Gregor & Ross, S.S.C.

[*M.* Clerk.

Tuesday, March 3.

FIRST DIVISION.

[Lord Gifford, Ordinary.

TRUSTEES OF WILLIAM SIMPSON'S ASYLUM *v.* JAMES GOWANS.

Lease—Essential error.

In a case where the lease of a quarry stipulated for the payment of a fixed rent, or in the option of the landlord, a royalty to be calculated according to the weight of stone on which carriage was charged in the railway company's books, which weights were to be held to be the correct weights, *Held* (diss. Lord Deas) that the landlord was not barred from concluding for arrears of lordship by having for several years accepted the fixed rent, he having been induced to do so by erroneous returns furnished by the tenant himself.

The pursuers of this action were proprietors of the estate of East Plean, in the county of Stirling, and in the year 1864 they granted a lease of a freestone quarry on the estate to the defender James Gowans, who bound himself to pay a fixed yearly rent of £200, or, in the option of the pursuers, a lordship of sixpence for each ton of ashler, and one penny for each ton of rubble stone. It was further provided by the lease that in order to ascertain the amount of lordships payable in respect of all stone sent off by railway, the weights for which carriage was charged should be held to be the correct weights; and, in respect of other stone, that each cartload should be held to be one ton weight.

The defender further bound himself to cause regular books to be kept, in which should be inserted in a distinct manner the whole out-put and disposals of the freestone, including any that might have been used for buildings connected with the workings, which books were to be at all times open and patent to the proprietors and their factor, or others authorised by them, and also to transmit quarterly to the proprietors, or their factor, extracts or statements from the said books of the quantities of freestone disposed of or used, which extracts it was provided should be certified by the tenant or by his manager, and verified on oath if required. The defender accordingly continued to transmit quarterly returns, but instead of taking the weights according to the railway books, he made up the returns from his own books, giving an amount greatly less than that which was really sent away. The pursuers, on the faith of these returns, settled with the defender from time to time, but at length, having reason to doubt the accuracy of the defender's statement, they examined the railway company's books, and finding from them that far more stone had been sent away than appeared from the defender's returns, they raised this action, concluding for payment of the arrears of lordship.

The Lord Ordinary (GIFFORD) pronounced the following interlocutor:—